

September 10, 2004

VIA ELECTRONIC FILING

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark,

On behalf of the Email Service Provider Coalition (“ESPC”), I am submitting the following comments to the FTC in response to the Notice of Proposed Rulemaking for the CAN-SPAM Act.

The ESPC is made up of 54 leading companies – all of which are struggling with the onslaught of spam, as well as the emerging problem related to the deliverability of legitimate and wanted email. Email service providers enable their customers to deliver volume quantities of email messages. These messages originate from the full spectrum of the US economy – large and small businesses, educational institutions, non-profits, governmental agencies, publications, and affinity groups all use the services of ESPs to communicate with their customers, members, and constituents. While ESPs serve the marketing needs of the business community, it is by no means the only customer group served. Email service providers also deliver transactional messages (such as account statements, airline confirmations, and purchase confirmations); email publications; affinity messages; and relational messages.

The ESP industry is robust and growing. Within the ESPC, we estimate that our members provide volume email services to over 250,000 customers. These customers represent the full breadth of the U.S. marketplace – from the largest multi-national corporations to smallest local businesses; from local schools to national non-profit groups and political campaigns; from major publications with millions of subscribers to small affinity-based newsletters.

Given the status of ESPs in the email industry, the membership of the ESPC has a deep understanding of the implications and effects of the CAN-SPAM Act. Our membership has spent a great deal of time reviewing the Act, the ANPR, and most recently the Proposed CAN-SPAM “Primary Purpose” Rule. We are happy to provide the following comments and would welcome the opportunity to discuss our views further.

1. Section 316.3 Primary Purpose Criteria

§ 316.3 (a) (1)

(1) If an electronic mail message contains only content that advertises or promotes a product or service, then the “primary purpose” of the message shall be deemed to be commercial;

The ESPC finds this section to be acceptable.

§ 316.3 (a) (2)

(2) If an electronic mail message contains content that advertises or promotes a product or service as well as content that pertains to one of the functions listed in paragraph (b) of this section, then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or

(ii) The electronic mail message’s content pertaining to one of the functions listed in paragraph (b) of this section does not appear at or near the beginning of the message;

As currently written, this section creates two individual tests to determine whether an email with both commercial and transactional or relationship (TR) content shall be deemed to be a commercial message for purposes of the Act. The first test looks at the perspective of a reasonable recipient interpreting the subject line of the email. The second test looks at the top of the email to see if TR content is present. Through the use of “or” between these two standards, the FTC has created a test for mixed content messages that will result in a message being considered commercial if it satisfies either test (in other words, if the subject line is reasonably interpreted to be commercial, OR if the TR content is not at the top of the body of the email).

The ESPC opposes these two stand-alone tests being used to determine whether a mixed content message should be considered commercial or TR in nature. In the comments to the proposed regulation, the FTC indicated support for a net impression test when determining the primary purpose of an email message. The ESPC similarly supported such a standard in our previous comments. However, the proposed regulation abandons the “net” impression test.

Using the subject line of an email as a stand-alone test is an extremely limiting and problematic method to determine the primary purpose of a mixed content message. To be sure, the subject line is a common tool for consumers to assess the content of an email message. And it should be used as *an* indicator of the primary purpose of the message. However, it should not be the only indicator – the message should be viewed as a whole to determine the primary purpose.

There are some particular concerns associated with subject lines that establish that, as a stand-alone indicator of primary purpose, the subject line is a poor test.

Subject Line Modification and Truncation:

Once a sender has dispatched an email, the presentation of the subject line to the recipient is largely beyond their control. In fact, what is actually presented to the recipient is dependant upon the recipient's ISP. Many popular ISPs limit the length of the subject line so that the recipient could see as few as 18-25 characters of the originally intended subject line. Other subject lines may be filtered or modified without any notice to the sender.

This character reduction or modification could completely change the meaning and perceived intent of the message. For example, a recipient may only see "Your special offer" displayed on their screen and believe that the message is purely commercial, when the originally intended subject line had been: "Your special offer and your monthly account statement".

As a result, the use of the subject line as a binary mechanism for determining the primary purpose of the message is inappropriate. Using such a test will place risks upon senders when the presentation of the subject line to the recipient is frequently beyond their control. Again, the subject line should be a component considered in the net impression test, but it should not be the only component.

Limits on Characters Available:

The subject line is also limited by the types of characters that are available for use. Extended characters and International characters are of less function and may not be producible at all within subject lines. This again militates against the use of the subject line as a single, stand-alone test for primary purpose.

The Net Impression Test

Based on these concerns, and with an understanding of the FTC's support for the net impression test, we propose that the rule be reformulated to take into account the net impression of the reasonable recipient based upon the entire message. This net impression test would be based upon the all of the components of the message¹. Particular consideration could be given to the subject line and the top of the message, which would presumably be visible in a preview pane, but this test would also consider other factors to make a determination on the nature of the email message.

If the net impression test is not adopted for determining primary purpose, and the subject line and top of the email message continue to serve as dispositive factors, we urge the FTC to change the conjunctive "or" between subsections (i) and (ii) to an "and." This will allow at least two features of the email (the subject line and top of the message) to be considered jointly. Again, the use of a single feature of the email is inappropriate for determining primary purpose.

§ 316.3 (a) (3)

(3) If an electronic mail message contains content that advertises or promotes a product or service as well as other content that does not pertain to one of the functions listed in paragraph (b) of this section, then the "primary purpose" of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or

(ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. Factors illustrative of those relevant to this interpretation include the placement of content that advertises or promotes a product or service at or near the beginning of the body of the

¹ The FTC's guidance for disclosures online (Dot-Com Disclosures) should be instructive in identifying and formulating a primary purpose test for email. Applying the Dot-Com Disclosures in this context makes clear that the subject line, "from" address, content of the message, use of graphics, placement of disclosures, and font treatments are all factors in considering the net impression created by the message.

message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.

The ESPC has similar concerns in this section about applying a test that looks at either the subject line or the body of the message. We propose that where the message has mixed content, none of which is transactional or relational, that a net impression test still be applied. The test would be whether a reasonable recipient looking at the whole message, including the factors that are included in (3)(i) and (3)(ii) as well as other factors, would find that the message is of a commercial nature.

2. The Urgent Need to Address Other Issues in the CAN SPAM Act

While the CAN SPAM Act directly requires the FTC to promulgate regulations on the standards to be applied when considering the primary purpose of an email message, there are many other compliance issues within the Act that require clear guidance from the FTC. Many of these issues were raised in the ANPR previously issued by the Commission.

We urge the FTC to review the ESPC's past comments on issues of "forward to a friend", postal addresses, affiliate marketing, the definition of "Sender", multiple advertisers, and opt-outs (particularly when multiple advertisers are involved in a message). Failure to clarify the intent and operation of these standards within the CAN SPAM Act will leave the use of email for commercial purposes with an unpredictable and costly compliance landscape.

In particular, we see the standard associated with primary purpose as related to the definition of "Sender" in the Act. Failure to address the definition of Sender while considering primary purpose standards may complicate the analysis of the definition in the future.

The Email Service Provider Coalition respectfully submits these comments for the Record.

For the Email Service Provider Coalition:

J. Trevor Hughes
Executive Director